

Rule 22, Ariz. R. Crim. P.

Ex Parte Communications Between Judge and Jury.....Revised 3/2010

Rule 22.3 of the Arizona Rules of Criminal Procedure provides:

After the jurors have retired to consider their verdict, if they desire to have any testimony repeated, or if they or any party request additional instructions, the court may recall them to the courtroom and order the testimony read or give appropriate additional instructions. The court may also order other testimony read or give other instructions, so as not to give undue prominence to the particular testimony or instructions requested. Such testimony may be read or instructions given only after notice to the parties.

The Comment to this Rule makes clear that it includes the right of both the jury and the parties to make requests for a review of the evidence or for additional instructions after deliberations have begun.

Ordinarily, it is reversible error if a trial court communicates with deliberating jurors without the defendant and both counsel present.

The general rule in Arizona is that reversible error occurs when a trial judge communicates with jurors after they have retired to deliberate, unless defendant and counsel have been notified and given an opportunity to be present. However, if it may be said, beyond a reasonable doubt, that there was no prejudice to the defendant, a communication between judge and jury outside the presence of defendant and counsel is harmless error.

State v. Benenati, 203 Ariz. 235, 236, ¶ 3, 52 P.3d 804, 805 (App. 2002) [citations omitted]. In *Benenati*, the trial court received four questions from the jury during deliberations. After receiving consent from counsel, the judge responded, “All the evidence has been presented to you. In reaching your verdict, you must rely on your collective recollection of the evidence.” *Id.* at 237, 52 P.3d at 806. After the jury had rendered its verdict, the court informed counsel that the jury had submitted a fifth question during the deliberations and that the court had answered that question in the same manner. Although the parties had “no opportunity to object or voice their concerns

regarding the judge's procedure until it [was] too late," the Arizona Court of Appeals found the response by the court to be harmless error. *Id.* The Court found that the defendant had not been prejudiced because the trial court's response did not refer to the evidence, was essentially a refusal to answer the question, and merely reiterated the court's previous instructions. *Id.*

If a court cannot conclude beyond a reasonable doubt that the defendant was not prejudiced by improper ex parte conversations between the judge and jury, reversible error will result. In *State v. Rich*, 184 Ariz. 179, 907 P.2d 1382 (1995), the Arizona Supreme Court reversed a conviction because the trial court had failed to disclose to counsel that the jury had returned inconsistent verdict forms. The Court stated:

The jury, by returning all three guilty verdict forms, was, in essence, communicating to the judge that it either did not understand the court's instructions or did not follow them. By withholding this information from the parties, the trial court created problems akin to those which are created when there are ex parte communications between a judge and the jury. We have often condemned such ex parte communications.

The general rule in Arizona is that reversible error occurs when a trial judge communicates with jurors after they have retired to deliberate unless defendant and counsel have been notified. We see no reason for a different rule here. However, we also acknowledge that where it may be said, beyond a reasonable doubt, that there was no prejudice to the defendant, a communication between judge and jury outside the presence of defendant and counsel is harmless error.

Id. at 180, 907 P.2d at 1384. [citations, internal quotation marks, and brackets omitted].

The Court also reiterated the rule of *Perkins v. Komarnycky*, 172 Ariz. 115, 118, 834 P.2d 1260, 1263 (1992):

[I]nquiries of even arguable substance or significance, whether dealing with legal rules or trial procedure, must be communicated to counsel before any response is made to the jury or before any decision not to respond is made.

Because it was impossible to infer whether a properly instructed jury would have found the defendant guilty of the drug possession for sale charge on which he had been convicted or solely on the lesser-included offense of drug possession, the Arizona Supreme Court found reversible error.

Arizona courts have continually denounced physical intrusions of judges into jury rooms. In *State v. Hilliard*, 133 Ariz. 364, 365-66, 651 P.2d 892, 893-94 (App. 1982), the Arizona Court of Appeals found reversible error based of four critical facts:

- (1) there was an actual physical intrusion by the judge into the jury room;
- (2) the communication was not clearly consented to by the defendant or his counsel;
- (3) there was an off-the-record discussion between the judge and a juror in the presence of the rest of the jury; and
- (4) there was no indication of what was discussed off the record.

The *Hilliard* Court noted the strength with which the Arizona Supreme Court has condemned the intrusion of a judge into the jury room:

There can be no question but that in the discharge of his official duty, the place for the judge is on the bench. As to him, the law has closed the portals of the jury room, and he may not enter. ... We find that in practically all of the reported cases appellate courts properly regard communications between the trial judge and jurors, relative to the trial, as of a more serious nature and more likely to have a prejudicial effect than communications between other court officials or attendants and jurors....

It is impossible to promote confidence in the administration of justice unless the jury is kept free from outside influences. In the instant case, if the jurors desired a question answered or further instructions, the proper way to have handled the matter would have been to bring them back into open court with its attendant safeguards.

Id. at 366, 651 P.2d at 894, *quoting State v. Burnetts*, 80 Ariz. 208, 211-12, 295 P.2d 377, 378-79 (1956) [ellipses by the *Hilliard* Court]. The Court held in *Hilliard* that it was “reversible error for the judge to enter the jury room after the jury has retired to

deliberate, regardless of the intent or content of any ensuing communication, and regardless of the prejudice, or lack thereof, resulting.” *Hilliard*, 133 Ariz. at 370, 651 P.2d at 898.

Case law interpreting Rule 22.3 of the Arizona Rules of Criminal Procedure makes clear that: (1) the trial judge should not enter the jury room once deliberations have begun; (2) the trial judge should provide notice to the parties and opportunity for objection before communicating with the jury; and (3) communications between the judge and jury should be conducted in open court, “on the record” utilizing a court reporter, and in the presence of counsel and the defendant.